1-3-2012

Henry v. Department of Correction Appellant's Reply Brief Dckt. 39039

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH HENRY,	)	
	)	
Claimant/Appellant,	)	**SUPREME COURT NO. 39039-2011**
	)	
vs.	)	
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants/Respondents.	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the Industrial Commission, State of Idaho

Thomas E. Limbaugh, Chairman, Presiding

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COMES NOW Appellant, by and through his attorney of record, in Reply to the arguments made by the Respondent, in their brief filed December 15, 2011.

ARGUMENT

A. Appellant has produced evidence demonstrating that his activities of work probably caused his heart attack.

Upon review of the Industrial Commission decision on appeal in this matter and upon the brief of the Respondents (hereinafter "Defendants"), it becomes clear that both the Industrial Commission and the Defendants in this case concede that the Appellant in this case (hereinafter "Claimant") provided evidence to a reasonable degree of medical probability that Claimant's activities after he arrived at work caused or contributed to the heart attack which he alleges occurred as a result of his work on November 15, 2009.

The Industrial Commission indicated in its decision at paragraph 35 that evidence solicited by the Claimant and by the Defendants from Claimant's treating physician, Dr. Mark Parent, indicated that Claimant's heart attack occurred as a result of activities in which Claimant was involved after he got to work. (R p. 21, ¶ 35). The Commission further noted that there was evidence in the record which supported this opinion. (R pp.12-14).

In their Response Brief, the Defendants agree that the Claimant offered evidence that the activities at work more probably than not contributed to the onset of his heart attack. (Resp't. Br. p. 8; Parent Depo., p. 48, l. 25, p. 48, ll. 1-11). However, Defendants allege that the Industrial Commission was correct in not relying upon or believing these opinions and the Defendant urges the Court herein to affirm the Industrial Commission's decision.

Unquestionably, the cardiac processes precipitating a heart attack are complex. Defendants appear focused on this complexity as support for the Industrial Commission's discounting of a reliable expert medical opinion. In their brief, Defendants write, "And, as Dr. Parent testified, it is not possible to determine with any certainty when that process began." (Resp't. Br. p. 11, Parent Depo. p. 53, ls. 11-19). Indeed, that may not be scientifically possible. Yet, as argued more fully, *infra*, testimony to a medical certainty to prove causation has been soundly rejected as a legal standard in a workers' compensation case. Claimant contends that affirming the Commission's decision in this case would deviate from standing Idaho precedent with respect to proving causation in a workers' compensation case.

B. The Industrial Commission erred by applying the wrong legal standard to the proof regarding causation.

Claimant contends that the Industrial Commission's failure to adopt the opinion of Dr. Parent is based upon an inaccurate and incorrect application of the legal standards which apply to causation in this case. It is clear that the Industrial Commission's disbelief of Dr. Parent's opinion is based upon the fact that Dr. Parent did not rule out all other possible causes for Claimant's heart attack. The Industrial Commission noted at paragraph 41 of its decision, that because Dr. Parent had failed to rule out other possible causes of the Claimant's heart attack, his opinion lacked foundation and was materially flawed. (R p. 23, ¶ 41).

In other passages of the Industrial Commission decision, it is clear that the Commission's view of the evidence required Claimant to offer evidence which is beyond that required by the legal standard which applies in this case. In paragraph 23, and later in paragraph 42, the

Industrial Commission indicated that Dr. Parent's testimony was flawed because he was unable to pinpoint that event which made Appellant's heart attack inevitable.

> "However, though mindful of all of these facts, Dr. Parent was unable to opine which of these activities/events made it inevitable that Claimant would suffer the November 15 thrombosis when he did."

(R pp. 17-18, ¶ 23).

Based upon these perceived inadequacies in Dr. Parent's testimony, the Industrial Commission found in paragraph 42 of its decision that Dr. Parent's testimony was insufficient to establish that Claimant's post-arrival activities were responsible for causing or contributing to the occurrence of Claimant's myocardial infarction. Further, the Industrial Commission noted that the evidence just as easily supports the proposition that it was something that happened prior to Claimant's arrival at the work site that made his heart attack inevitable and caused it to occur when and how it did. (R pp. 23-24, ¶ 42).

Claimant contends that in these statements, it is clear that the Industrial Commission required Claimant to satisfy a legal standard with regard to causation which does not apply in proceedings before the Industrial Commission or proceedings before any other Court in this State.

Defendants, in their brief, allege that Claimant has misconstrued the Industrial Commission's reasoning and that the Industrial Commission did indeed apply the correct standard of causation in this case. Claimant contends that if the reasoning behind the Industrial Commission's interpretation of the causation evidence in this case is closely examined, it is clear

that the Industrial Commission was requiring the Appellant to satisfy a "but for" standard of causation and prove that the Claimant's work-related activities were the only cause of his injury.

It is to be remembered that the claimant in a worker's compensation case does not have to prove that the work accident or activities were the only cause of the injury complained of. As Claimant noted in his Opening Brief, the law on this point is well stated in *Bowman v. Twin Falls Construction Company,* 99 Idaho 312, 581 P.2d 770 (1978) and *DeMain v. Bruce McLaughlin Logging,* 132 Idaho 782, 979 P.2d 655 (1999), in which the Industrial Commission and this Court found that a claimant in a worker's compensation case only needs to prove that his work related activities or work accident were a factor in leading to his injury and disability.

In District Court proceedings, the law is equally clear holding that the standard of proof on causation only requires that the plaintiff show that the accident was a substantial factor in causing the injury complained of. Such a cause can be a substantial contributing cause even though the injury, damage or loss would have occurred anyway without that contributing factor. A substantial cause need not be the sole factor or even the primary factor in the injury but merely a substantial factor. *See, Newberry v. Martens,* 142 Idaho 284, 127 P.3d 187 (2005); *Garcia v. Windley,* 144 Idaho 539, 164 P.3d 819 (2007).

Applying that law to the Industrial Commission's decision herein, the fallacy of the Commission's reasoning is well illustrated. The Industrial Commission found that because Dr. Parent had failed to factor in non-work related activities, then his opinion was not to be believed. (R p. 18, ¶ 24). Indeed, the Industrial Commission totally disregarded the opinion of Dr. Parent with regard to causation based upon these perceived weaknesses. The Industrial Commission

discussed, at some length, evidence which indicated that the Claimant appeared to feel unwell at the time he first arrived at work and indicated that because Dr. Parent did not take this factor into account, his opinion could not be given any weight and was without foundation. (R pp. 17-18, ¶¶ 23-24; R pp. 23-24, ¶¶ 41-42).

The reasoning of the Industrial Commission therefore appears to be that if there were other possible non-work related causes of Claimant's heart attack on the morning of November 15, 2009, then the work-related activities which were also factors in Claimant's heart attack which occurred that morning could not have been a proximate cause of his injury. As such, the Industrial Commission's logic requires the Claimant to prove that the work related activities in which Appellant was engaged on the morning of November 15, 2009, were the only cause of his injury.

This faulty legal standard permeates the Commission's decision. In repeated passages, the Industrial Commission's reasoning requires Claimant to prove that but for specific work related activities, Claimant's heart attack would not have been inevitable. At paragraph 23 of the Industrial Commission decision, the decision notes as follows:

> "However, Dr Parent was much more circumspect about identifying the event or events which made the occurrence of the blockage inevitable. It is impossible, in other words, to say whether the inciting events which led to the plaque rupture occurred prior to Claimant's arrival on the premises, or subsequent thereto."

(R p. 17-18, ¶ 23).

Claimant contends that this statement clearly and unequivocally requires Claimant to

satisfy a "but for" standard of proof. Claimant was held to a standard of demonstrating that a work related activity caused the heart attack to be inevitable. Claimant contends that this is an incorrect legal standard. The correct causation standard only requires Claimant to prove that the work related activities were a factor or a substantial factor in making the heart attack inevitable. As it stands, Claimant has been deprived of the benefit of the correct legal standard.

Claimant further contends that even if one assumes that all of the non-work related factors listed and discussed by the Industrial Commission were factors in causing Claimant's heart attack, the work related factors discussed by Dr. Parent were still a substantial factor in leading to his heart attack on the morning of November 15, 2009. Indeed, Dr. Parent offered testimony delineating his opinion about these other non-work related causes and this opinion was discussed by the Industrial Commission in its decision. As the Court herein may recall, defense counsel corresponded with Dr. Parent prior to the hearing in this case and requested Dr. Parent to consider non-work related factors for Claimant's injury. Dr. Parent did so and wrote back to defense counsel indicating that Claimant's preexisting conditions may have been responsible for fifty percent of the reason for Claimant's injury, while Claimant's work related activities constituted the other fifty percent causation contribution. (R pp. 13-14, ¶ 20).

Claimant contends that a fifty percent work-related contribution is a substantial factor in the causation of Claimant's heart attack and the Industrial Commission erred in disregarding this opinion totally. Specifically, the Industrial Commission erred in discounting Dr. Parent's opinion on causation simply because there may have been other possible causes which could have contributed to the Claimant's heart attack.

The Industrial Commission's decision to disregard the opinion offered by Dr. Parent, therefore, is contrary to the law set forth in *Newberry, supra*, and *Garcia, supra*, and should be reversed on that ground.

C. The Industrial Commission's denial of benefits is not supported by substantial and competent evidence.

As noted above, the Defendants in this case admit that Dr. Parent's opinion, as solicited by the Claimant, was sufficient to prove his case and constituted substantial and competent evidence to support the allegation made by the Claimant that his heart attack was caused by activities of his work on the morning of November 15, 2009. (Resp't. Br. p. 8; Parent Depo., p. 48, l. 25, p. 48, ll. 1-11).

Having made that admission, it appears clear that the burden of proof of discounting that opinion offered by Dr. Parent devolves to the Defendants. The Defendants therefore carry the burden of proof to disprove the opinion of Dr. Parent.

In their brief, the Defendants do not address the burden of proof issue in any manner but simply argue that the Industrial Commission's denial of benefits was supported by substantial and competent evidence. Claimant continues to contend that the reasons chosen by the Industrial Commission to disbelieve Dr. Parent's opinion were not medically significant and do not constitute substantial and competent evidence. Many of the issues chosen by the Industrial Commission were previously addressed by the parties and were found to be medically insignificant by Dr. Parent.

Specifically, Claimant's appearance at the time he arrived at work and his pre-arrival

activities were fully addressed by defense counsel in the deposition of Dr. Parent and he indicated that although these factors may have played some role in Claimant's health history, these factors did not lead him to change his opinion that Claimant's heart attack was precipitated by events which occurred after the Claimant arrived at work and was exerting himself strenuously in cold weather. Claimant has previously discussed these points in his Opening Brief at pages 26, 27 and 28 and will not reiterate those points again. Suffice it to say that the Industrial Commission's reliance upon this evidence is misplaced and in this regard, the Industrial Commission has erred.

Defendants' brief also talks about the timing of the onset of symptoms and mirrors the Industrial Commission's decision on this particular point. Again, Claimant contends that the timing issue was specifically addressed by Dr. Parent and led him to conclude that it was Claimant's activities after he arrived at work that specifically led to the heart attack which Claimant suffered.

> "I don't think that artery closed when he was getting in the car that morning or when he drove from Caldwell to Boise. I think it closed when he was walking up those stairs, and it hit him very suddenly.
>
> For you to ask me what's the contribution of the cold morning getting in the car and the drive to Boise is for me too fine a point to be so accurate and to give you an opinion on what contribution – I just can't give that."

(Parent Depo. p. 55, ll. 15-24).

In the face of this testimony, the Industrial Commission found at paragraph 23 of its decision as follows:

> "It is impossible, in other words, to say whether the inciting events that led to the plaque rupture occurred prior to Claimant's arrival on the premises, or subsequent thereto."

(R p. 17, ¶ 23).

Claimant contends that in making this conclusion, the Industrial Commission has not only misconstrued the testimony of Dr. Parent, they have relied upon evidence which was dismissed by Dr. Parent as being medically inconsequential. In addition, the Industrial Commission is relying upon assumptions and conjecture which is not supported by medical evidence in the record. Even though the Defendants failed in their obligation to offer substantial and competent evidence which undermined Dr. Parent's opinion which established that Claimant's work-related activities were a factor in leading to his heart attack, the Industrial Commission still assumed that many of the same factors discussed by Defendants and dismissed by the Doctor were enough to undermine Dr. Parent's opinion. These assumptions, as discussed above, were all made without the benefit of substantial and competent evidence to support them. Claimant therefore contends that the Industrial Commission's opinion denying benefits must be reversed because it is not based on substantial and competent evidence.

RESPECTFULLY SUBMITTED.

DATED This 29 day of December, 2011.

Richard S. Owen

David M. Farney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 3 day of January, 2012, a true and correct copy of the foregoing document was mailed, U. S. Postage prepaid, to:

Bridget A. Vaughan
1001 N. 22nd St.
Boise, Idaho 83702

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen